SENATE PCS 33:
Medical Liability Reforms

2011-2012 General Assembly

Committee:	Senate Judiciary I	**Date:**	February 15, 2011
Introduced by:	Sens. Apodaca, Brown, Rucho	**Prepared by:**	Bill Patterson Committee Counsel
Analysis of:	PCS to First Edition S33-CSTG-1		

SUMMARY: In medical malpractice actions, the PCS to Senate Bill 33 will:

- require a finding of gross negligence, wanton conduct or intentional wrongdoing to recover damages in claims arising out of the furnishing of or failure to furnish emergency medical services required to be provided under federal law
- require separate trials on the issues of liability and damages on motion of any party in cases seeking damages of at least $75,000
- limit noneconomic damages to $250,000
- on motion of any party, require that future economic damages with a present value of at least $75,000 must be paid in periodic payments rather than in one lump sum
- require damage awards to specify the amount awarded as noneconomic, present economic, and future economic damages
- allow appellants having malpractice liability insurance coverage of at least $1 million to stay execution pending appeal by posting a bond equal to the amount of the judgment or the amount of their insurance coverage; for appellants having less than $1 million in coverage or no coverage, the appeal bond would be limited to the amount of the judgment or $1 million, whichever is less

CURRENT LAW AND BILL ANALYSIS:

Section 1: Emergency Services Required to be Provided by Federal Law

Current law**:** G.S. 90-21.12 provides that a "health care provider" is not liable for damages in a "medical malpractice action"[1] unless the trier of fact finds by the greater weight of the evidence that the care provided "was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action."

[1] The terms ""health care provider and "medical malpractice action" are defined in G.S. 90-21.11 as follows:

As used in this Article, the term "health care provider" means without limitation any person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, psychology; or a hospital or a nursing home; or any other person who is legally responsible for the negligence of such person, hospital or nursing home; or any other person acting at the direction or under the supervision of any of the foregoing persons, hospital, or nursing home.

As used in this Article, the term "medical malpractice action" means a civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider.

G.S. 90-21.14 requires a showing of gross negligence, wanton conduct or intentional wrongdoing before liability can be imposed upon any person who receives no compensation for his or her services as an emergency medical care provider, and who renders first aid or emergency health care treatment to a person who is unconscious, ill, or injured under circumstances requiring prompt action in which any delay in treatment would seriously worsen the person's physical condition or endanger the person's life.

Consequently, under current law, providers of emergency medical care who are compensated for their services are subject to liability in malpractice actions under the general standard of care set forth in G.S. 90-21.12.

Bill Analysis: Section 1 amends G.S. 90-21.12 to add new subsection (b) providing that in a medical malpractice action arising out of the furnishing or the failure to furnish services pursuant to obligations imposed by the federal Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd ("EMTALA")[2], liability may not be imposed unless the trier of fact finds that the defendant's failure to meet the statutory standard of care constituted gross negligence, wanton conduct or intentional wrongdoing. Section 1 also designates the current statutory language as subsection (a) and makes technical and clarifying changes. **The PCS rewrote Section 1 by limiting its application to malpractice actions arising out of emergency services required to be provided under EMTALA, and by requiring a finding of gross negligence, wanton conduct or intentional wrongdoing "by clear and convincing evidence" rather than "by a preponderance of the evidence" before liability can be imposed.**

Section 2: Separate Trials of Liability and Damages

Current law: Courts are currently permitted, but not required, to grant a motion for separate trials of any issues "in furtherance of convenience or to avoid prejudice." G.S. 1A-1, Rule 42(b)(1).

Bill Analysis: Section 2 adds a new subdivision (3) to Rule 42(b), applicable in medical malpractice actions in which the plaintiff seeks damages of at least $75,000 that will:

- require the court, on motion of any party, to order separate trials on the issue of liability and damages
- prohibit the admission of evidence relating solely to compensatory damages until liability is established

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[2] 42 U.S.C. § 1395dd(a) requires that when a patient presents to a hospital emergency department, the hospital is obligated to determine whether the patient has an ""emergency medical condition," defined as:

> (A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—
> (i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,
> (ii) serious impairment to bodily functions, or
> (iii) serious dysfunction of any bodily organ or part; or
> (B) with respect to a pregnant woman who is having contractions—
> (i) that there is inadequate time to effect a safe transfer to another hospital before delivery, or
> (ii) that transfer may pose a threat to the health or safety of the woman or the unborn child.

42 U.S.C. § 1395dd(e)(1). If the patient is determined to have an emergency medical condition, then the hospital is obligated to provide treatment necessary to stabilize the medical condition, regardless of the patient's ability to pay for those services, unless transferring the patient to another medical facility for treatment would be more beneficial to the patient. 42 U.S.C. § 1395dd(b), (c).

- require the same trier of fact to try the liability-related issues and the damages-related issues

Section 3 – Liability Limit for Noneconomic Damages

Current law: There currently is no limit on the amount of noneconomic damages for which a medical malpractice defendant may be found liable. However, trial courts are authorized under Rule 59 of the Rules of Civil Procedure to order a new trial if it appears that excessive or inadequate damages have been given under the influence of passion or prejudice or if the evidence is insufficient to justify the verdict. G.S. 1A-1, Rule 59(a)(6), (7).

Bill Analysis: Section 3 adds a new G.S. 90-21.19 to Article 1B of Chapter 90 of the General Statutes that will:

- impose a cap of $250,000 per plaintiff on noneconomic damages in medical malpractice actions
- define "noneconomic damages" as "damages to compensate for pain, suffering, emotional distress, loss of consortium, inconvenience, physical impairment, disfigurement, and any other non-pecuniary, compensatory damage"
- prohibit informing the jury of the cap on noneconomic damages

Section 4: Periodic Payment of Future Economic Damages

Current law: An award of future damages is reduced to its present value by the trier of fact, to be paid in one lump sum as part of the judgment. N.C. Pattern Jury Instruction – Civil – 810.16.

Bill Analysis: Section 4 enacts a new G.S. 90-21.19A that will:

- require the verdict form to indicate specifically the amount being awarded for future economic damages
- in cases where the present value of the future economic damages awarded by the trier of fact is at least $75,000, require the court to enter an order on motion of any party that the future economic damages be paid in whole or in part by periodic payments rather than by a lump-sum payment
- require that any judgment ordering future periodic payments also order that the payments be made through a trust fund or purchase of an annuity for the life of the plaintiff on terms approved by the court, including the amount and schedule of the periodic payments
- provide that upon the death of the plaintiff the liability for payment of future periodic payments not yet due will cease, except that the court entering the original judgment may modify the judgment to provide that future periodic payments to compensate the plaintiff for future lost earnings shall continue to be paid to persons surviving the plaintiff to whom the plaintiff owed a duty of support pursuant to law

Section 5: Form of Verdict in Medical Malpractice Actions

Current law: There is no current statutory requirement that separate elements of damages must be separately stated in a verdict or award of damages.

Bill Analysis: Section 5 enacts a new G.S. 90-91.19B requiring that the verdict or award of damages in a medical malpractice action indicate specifically the amount being awarded for noneconomic damages, present economic damages, and future economic damages, and requiring the court to instruct the jury on the statutory definitions of these damages.

Section 6: Modified Appeal Bond

Current law: In order to stay execution of a money judgment during the pendency of an appeal, an appellant is required to post a bond equal to the amount of the judgment. However, in cases in which the judgment exceeds $25 million, the bond is limited to $25 million, unless the appellee proves that the appellant is seeking to evade the judgment by dissipating, secreting, or diverting its assets. G.S. 1-289.

Bill Analysis: Section 6 amends G.S. 1-289 by adding a new subsection (b1) to provide that if an appellant's malpractice insurance coverage is at least $1 million, the bond required to stay execution in a medical malpractice action is the amount of the judgment or the amount of the appellant's insurance coverage, whichever is less. In addition, new subsection (b2) provides that if the appellant has no coverage or has coverage of less than $1 million, then the required bond is the amount of the judgment or $1 million, whichever is less. The appellee will be permitted to have this limitation set aside by showing that the appellant is dissipating, secreting or diverting assets to evade the judgment. **The PCS revised subsection (b1) to add the $1 million minimum coverage requirement and added subsection (b2) relating to appellants having no coverage or coverage of less than $1 million.**

Section 7: Severability

Bill Analysis: Section 7, **added by the PCS**, provides that if the provisions of Section 3 of the act are declared to be invalid, Sections 4 and 5 of the act are repealed, but the invalidity of Section 3 will not affect other provisions of the act that can be given effect without the invalid provision.

EFFECTIVE DATE: The effective date of the act is October 1, 2011. Sections 1, 3, 4, and 5 apply to causes of action arising on or after October 1, 2011. Sections 2 and 6 apply to actions commenced on or after October 1, 2011. **The PCS made Section 6 (appeal bond) applicable to actions commenced on or after the effective date; in the original bill Section 6 was made applicable to judgments entered on or after the effective date.**

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